BEFORE THE STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

I/M/O THE PETITION OF JERSEY CENTRAL POWER AND LIGHT COMPANY FOR APPROVAL OF AN INCREASE IN BASE TARIFF RATES, DEFERRED BALANCES FILING AND 2002 CED FILING	**))))))**	**DOCKET NOS. ER02080506, ER02080507, AND ER02070417** **OAL DOCKET NO. PUC 07894-02, 07984-02, AND 07983-02**

DIVISION OF THE RATEPAYER ADVOCATE'S
ANSWER TO JCP&L'S MOTION FOR RECONSIDERATION
OF THE BOARD'S SUMMARY ORDER

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Table of Contents

Table of Authorities

Cases

Board Orders

Statutes

I. Jersey Central Power & Light Company's Motion is Premature and Should be Denied.

On July 31, 2003 the Board of Public Utilities ("Board", "BPU") issued a Summary Order ("Summary Order") memorializing the actions taken by the Board at its July 9, 2003 agenda meeting with respect to the substantive issues at bar. In its Summary Order, the Board clearly stated the purpose of the Summary Order:

> This Summary Order is being issued for the purpose of implementing new rates on August 1, 2003, consistent with the requirements of the Electric Discount and Energy Competition Act, ("EDECA"), N.J.A.C.. 48:3-49 et seq. and the Board's Orders implementing EDECA. [Summary Order, p. 1.]

Furthermore, within the body of the Summary Order, the Board clearly stated that a Final Decision and Order would be forthcoming, with a "fuller discussion of the issues as well as the reasoning for the Board's determinations."[1]

Notwithstanding the clear language found in the Board's Summary Order, Jersey Central Power & Light Company ("JCP&L", "Company") filed the Motion now before the Board, seeking *inter alia* a remand to the Office of Administrative Law for further fact finding. The Ratepayer Advocate respectfully submits that the Company's Motion is premature in this instance. JCP&L's Motion is a textbook example of where the Board should follow the language of its Rules governing rehearing, reargument, and reconsideration. The pertinent Rule - *N.J.A.C.* 14:1-8(a) - provides:

> A motion for rehearing, reargument or reconsideration of a proceeding may be filed by any party within 15 days after the issuance of any final decision or order by the Board. [emphasis added]

Clearly, the Summary Order is not a final Order such as that contemplated in *N.J.A.C.* 14:1-8(a). In fact, JCP&L acknowledges that the Board has yet to issue a final Order in the instant proceeding and cites the relevant Rule. Nonetheless, the Company argues that it "believes that it is appropriate under the circumstances to bring its concerns promptly to the Board's attention at this time by way of the within Motion, without waiting for the issuance at some future date of the Board's Final Decision and Order in these proceedings." *Motion*, p. 1.

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[1] The Summary Order addressed a Final Decision and Order and its contents: " The Board will issue a more detailed Final Decision and Order in these matters that will provide a fuller discussion of the issues as well as the reasoning for the Board's determinations. [Summary Order, p. 1.]

The principle relief which the Company seeks is a remand to the OAL of the issue of the prudency of its Basic Generation Service ("BGS") procurement practices for an Initial Decision by an Administrative Law Judge ("ALJ"). The Company also asks for reconsideration of the Board's Return on Equity ("ROE") ruling and merger cost ruling. Here, there are ample reasons to deny the relief sought by the Company in its Motion.

First, granting the request for a remand sought by JCP&L would squander limited resources. It is not unreasonable to believe that the Board's anticipated Final Decision and Order would cover much of the same ground as a remand to the OAL. Undoubtedly, the ALJ originally assigned to this matter has a full case load. A remand would conceivably place other current OAL matters on hold so that the ALJ may review the thousands of pages of transcripts, exhibits and briefs in this case and then write another Initial Decision. This would appear to be a waste of limited judicial resources. The ALJ below ably presided over a complex and lengthy proceeding in which a complete record was developed, consisting of volumes of written testimony, transcripts, and exhibits. Much like the ALJ, the Board has before it a record upon which it can render a decision. The Board has the expertise to review that record and to render a decision accordingly. Based on the clear language of the Summary Order, it is not unreasonable to expect that the anticipated Final Decision and Order will include a full discussion of the issues together with the basis for the Board's rulings. Furthermore, as set forth below, the Board's ruling on JCP&L's BGS costs was supported by the record.

Likewise, with respect to the ROE and merger cost issues, the Board has yet to issue a Final Decision and Order setting forth a full discussion of the issues and the reasoning underling its rulings. Again, as set forth in the Board's Summary Order, it is anticipated that the Board's Final Decision and Order will embody a full discussion of the issues and the Board's reasoning. Absent such information, JCP&L's motion imputing the Board's reasoning and analysis is specious at best. Nonetheless, as set forth in detail below, there is ample support in the record to support the Board's ruling on these issues.

In sum, the Ratepayer Advocate respectfully submits that JCP&L's Motion should be denied. First, as previously noted, the Motion itself is procedurally defective in that the Summary Order is not a <u>final</u> Order meriting a review at this juncture in this instance. Second, the Company's argument that the Board failed to provide factual findings in support of its conclusion is also without merit. The Summary Order is merely a placeholder so that the rates can be implemented at the mandated time. The Board has not yet fully expressed the reasons for its decisions in its Final Decision and Order. Finally, as set forth in detail below, to the extent the Board entertains the Company's Motion, there is ample support in the record for the Board's rulings on the matters at issue.

II. JCP&L's Comparison to PSE&G is Without Basis in the Record.

In its Motion, JCP&L ignores the factual record and cites "unexplained differences" between the Board's treatment of the PSE&G Settlement and its treatment of the JCP&L Stipulation and claims that the differences are "particularly disturbing." *Motion*, p. 2. However, even a cursory review of the cases reveals significant factual distinctions. For example, although PSE&G has much larger jurisdictional electric utility revenue, PSE&G's allowed BGS costs amounted to only $241.5 million, whereas JCP&L's allowed BGS(/MTC) costs amounted to $465.5 million.[2] Other factual distinctions abound. JCP&L's comparisons of the JCP&L and PSE&G base rate case decisions similarly ignore factual distinctions. JCP&L focuses on the result and fails to consider the basis for each utilities' base rate and deferred balance claims. *Motion*, p. 3. The factual distinctions between the two cases render JCP&L's claim specious at best.

In addition to its claim about "unexplained differences" between the Board's JCP&L and PSE&G rulings, JCP&L suggests that the Board was "unduly influenced by extraneous matters." *Motion*, pp. 2-3. In "support" of this claim, JCP&L appended many recent newspaper articles documenting the outage woes of its New Jersey customers and more recent failures of its New Jersey distribution system. The Ratepayer Advocate respectfully submits that the Board is statutorily charged with the regulation of New Jersey public utilities, and to suggest that the Board was "unduly" influenced by such articles suspends belief. The substance underlying the articles is well documented and the extent of the recent and past outages in JCP&L's New Jersey service territory are not at issue. For the Board to ignore such problems would be tantamount to the Board neglecting its statutory duty to ensure that New Jersey utility customers are provided with safe, adequate, and proper utility service at reasonable rates. The Board's concerns about service reliability are not undue and matters relating to the adequacy of service provided by JCP&L are not extraneous to its base rate case. For the reasons set forth above, the Ratepayer Advocate respectfully submits that JCP&L's claims based on comparisons to PSE&G and evidence of its distribution system problems should be summarily

[2] *I/M/O PSE&G*, BPU Docket Nos. ER02050303, ER02080604, EM00040253, *et al.* (Summary Order, 7/31/03), p. 6; JCP&L Summary Order, p. 13.

dismissed.

III. The Board Was Correct in Rejecting the Initial Decision.

The Company's attack on the Board's well reasoned decision is based on nothing more than a misinterpretation of legal principals and mischaracterization of key procedural and substantive facts in this case. A brief description of the events leading up to the Board's decision will help to illustrate the faulty logic used by the Company to discredit the Board. On Friday, June 27, 2003 the Company, along with 5 intervenors filed a stipulation with the Office of Administrative Law. Two major participants, the Ratepayer Advocate and the Board Staff were not a party to the stipulation. Three working days later on July 2, 2003, the ALJ adopted the stipulation and filed an Initial Decision with the Board. The ALJ's Initial Decision, which constituted 5 pages of procedural history and one page of analysis and conclusion, adopted the settlement without amendments. On July 25, 2003, the Board rejected the Initial Decision in total. The Summary Order found both the settlement and the Initial Decision to be "unreasonable and unacceptable" because it did not balance the interest of the parties to the proceeding adequately. *Summary Order* p. 4.

As an initial matter, the Company's claim that the Board failed to provide the factual basis for rejecting the Initial Decision is without merit. The Company argues that "the Board flatly rejected ALJ Jones' Initial Decision and Settlement out of hand, finding in conclusory fashion that they were 'unreasonable and unacceptable, in that they do not adequately balance the competing interest in this case.'" *Motion* at 2. As discussed above, the Company's claim that the Summary Order is somehow incomplete is because the motion for reconsideration is based on a Summary Order, not a Final Order. A Summary Order by its very nature is abbreviated and has less details on rationale than a Final Order. The Company filed a motion for reconsideration prematurely and then faults the Board for not providing details in its Summary Order. *Motion* 19. Perhaps JCP&L should have waited until a Final Order before lodging a complaint about the lack of substance of the Order.

Moreover, the Board had every reason to reject the Initial Decision that adopted a self serving settlement that addressed the interest of only a small segment of the customer population. As the Ratepayer Advocate's Exceptions and Reply to Exceptions set forth in detail, the parties to the stipulation did not represent a majority of JCP&L's customers. The two most active parties in this case, Board Staff and the

Ratepayer Advocate did not participate in the settlement negotiations and did not sign on to the document. The participating parties represent large energy users with limited issues to address.[3] Small commercial and residential customers had only the Ratepayer Advocate to advocate for their interests. Therefore, residential and small commercial customers were not represented at the negotiation table. Finally, as discussed in our exceptions, the signatories to the "settlement" walked away from the negotiations with close to their litigated position, leaving residential and small commercial customers with very little if any benefit.[4] In the face of these glaring problems, the ALJ inexplicably adopted the settlement proposal. Three short business days after the settlement document was submitted to the OAL, the ALJ adopted the stipulation in a surprisingly short decision, without giving specific reasons why she thought it was well balanced.

The Board, as the government agency mandated to balance the interest of the ratepayers and shareholders, could not, in good conscience, adopt an Initial Decision that endorsed such an inequitable outcome. Contrary to the Company's assertions, the Board has the right to accept, modify or <u>reject</u> initial decisions. The Board exercised its right to reject the Initial Decision and based on the extensive evidence in the record, decided a more equitable outcome. With respect to the Company's criticism that the Board should have remanded the matter back to the OAL in order to have a "trained fact finder's" input, the Ratepayer Advocate strongly disagrees. *Motion*, pp.2, 18. The Board has broad and sweeping powers over all aspects of public utilities subject to its jurisdiction. *See N.J.S.A.* 48:2-13; *Township of Deptford v. Woodbury Town Sewerage Corporation*, 54 *N.J.* 418 (1969); *In re Public Service Electric and Gas Company*, 35 *N.J.* 358, 371 (1961). To suggest that the Board is somehow lacking in the necessary expertise to make a finding

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[3] As discussed fully in the Ratepayer Advocate Exceptions, the stipulation was signed by Intervenors that did not fully participate in the case, who did not attend public hearings, who did not present testimony or attend evidentiary hearings on issues of revenue requirement, depreciation, service reliability, capital structure, rate base, BGS prudence review, and SBC clauses. The Intervenors fully participated in only the rate design issues and left other important issues unaddressed. *RPA Exceptions*, pp. 1-2**.**

[4] For example, CoSteel sought in hearings and achieved in the settlement, a rate applicable only to itself. The Settlement recognized the "unique status" of the DOD/FEA and accorded DOD/FEA a "unique" rate to go along with that special status. Similarily, New Jersey Transit sought in hearings and achieved in settlement, two modifications to the Company's Tariff for Service Classification GT - Commuter Rail Service Special Provision. *RPA Exceptions*, p. 2.

on its own accord without the assistance of the OAL is an insult to the Board's competence and wholly without merit. The evidence gathered throughout this proceeding was available to the Board prior to its decision. Therefore, the Board had the expertise, the access to information and ample time to make a well thought out decision. To suggest otherwise is not supported by the facts.

Finally, there is no public policy dictating that the Board must accept stipulations when the interest of two major parties to the litigation was not represented in the stipulation. It is true, as JCP&L contends, that there is a strong public policy in New Jersey in favor of settlements. *Motion* at 23 (citations omitted) This public policy is founded on the concept that "the parties to a dispute are in the best position to determine how to resolve a contested matter in a way which is least disadvantageous to everyone." *Dept. of Pub. Advocate v. N.J. Bd. of Pub.Util.*, 206 N.J. Super. 523, 528 (App. Div. 1985). In the present case, however, two major parties to the proceeding, Staff and the Ratepayer Advocate did not attend any of the settlement meetings. The stipulation could not have been a balanced document that was "least disadvantageous to everyone" when large segments of JCP&L's customer groups, the residential and small commercial customers, were not represented. In such circumstances, the Board was correct in putting aside the stipulation. The Board's decision in this matter is a more balanced outcome and should be sustained.

IV. The Board's Decision to Reduce The Company's Proposed BGS Deferral Amount Was Not Based On Hindsight as Suggested by The Company But Was Based on Well Reasoned Analysis.

1. The Company Has Twisted The Board's Standard of Review In An Attempt To Preclude Any Meaningful Review of The Company's BGS Procurement Practices.

The Company opens it arguments with the Auditor's statement as to the appropriate standard for a prudence review. *Motion,* pp. 7-8. The Company then argues that this standard precludes "'hindsight' reviews, recognizing that prudence must be assessed at the time . . . procurement decisions were made " *Motion*, p. 8 (citation omitted). Thus, according to the Company's mis-interpretation of the law, any Board review of the Company's BGS procurement activities could only take place at the time those procurement decisions were made.

The standard of review for a determination of prudency has been clearly articulated by the Board and was known to the Company at the time EDECA was enacted which mandated that only "reasonable and prudently incurred" BGS deferred balances could be recovered in rates. As discussed in the Ratepayer Advocate Initial and Reply Briefs (*RAIB vol. 2* p. 1-5; *RARB* p. 63):

> The Company's conduct should be judged by asking whether the conduct was reasonable at the time, under the circumstances considering that the company had to solve its problem prospectively rather than in reliance on hindsight. In effect, our responsibility is to determine how reasonable people could have performed the tasks that confronted the Company.
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> The Company, as discussed earlier in this Order, had the burden of proof with respect to the reasonableness of the costs that were expended in building the plant. In order to meet that burden with respect to the various enhancements, the Company had to show the reasons why each of the enhancements were installed and the benefits to be derived from their installation. An integral part of the benefits associated with the enhancements is a justification of the costs.

I/M/O Public Service Electric and Gas Company for an Increase in Rates, Hope Creek Proceeding, BPU Docket No. ER85121163, OAL Docket No. PUC 0231-86 (April 6, 1987) ("Hope Creek Order").

The Company refuses to confront this clear articulation of the Board's standard for prudence determination and instead attempts to distract the Board with cries of "hindsight review." The Company repeatedly argues that JCP&L has the "right" to recover the entire BGS purchased power costs and that "any hindsight analysis [is] meaningless." *Motion* pp. 5, 16. In fact, the very nature of EDECA and the statute's structure to compensate utilities for reasonable costs that were prudently incurred calls for a retrospective review of a company's performance. The statute envisioned a *post hoc* review when it set the standard that costs that were reasonable and prudently incurred could be recovered. Ultimately, EDECA requires that the Board look back to the Company's actions taken during the transition period and determine whether those actions were prudent and reasonable at the time, given the information that was known or could have been known at the time. The very statutory language that is expressed in the past tense indicates a future analysis of past practices. In the Company's misguided interpretation of the law, no true analysis of events could ever take place except at the instant that a decision is made. Such an understanding is inconsistent with the statute, Board practice regarding reviews of utility performance, and settled case law, and indeed, is even contrary to the advice of the Company's own consultants. *See, RAIB Vol. II* at 35-39.

Nevertheless, the Company discounts the use of historic-looking review, relying on the Board's decision in *I/M/O the Motion of the Division of the Ratepayer Advocate for Reconsideration of the Four Decisions Issued on March 30, 2001 in the New Jersey Gas Utilities' Levelized Gas Adjustment Clause Proceedings*, 216 PUR 4^{th} 444 (2002). *Motion*, p. 7. According to the Company, the Board "flatly rejected 'hindsight' reviews" in allowing recovery of costs associated with decisions that could, in hindsight, be viewed as unreasonable. In relying on this case, the Company failed to consider a salient and determinative fact in the Board's decision – that the prices skyrocketed in one year to levels 300% above what they had been twelve months earlier. *See id.*, at 448. The Board was, therefore, unwilling to impose what the Company labels "hindsight" vision on a situation that no-one could have reasonably anticipated. *Id*. The Company points to no reason in that decision that could cause one to infer that the Board would be reluctant to execute a logical and reliable historic review under ordinary circumstances, as it has done in this proceeding.

The *Hope Creek Order* established the standard for a vigorous prudence review. *RAIB* vol 2, p. 3. And, evaluating the reasonableness of management decisions is primary in determining whether a utility has acted prudently. In the instant proceeding, the Company has failed to demonstrate that management decisions regarding BGS costs and procurement practices were reasonable and prudent. The Board must not allow repeated cries of "hindsight review" to obscure this fundamental failure by the Company to prove its case.

2. The Auditor's Report Was Flawed And Should Not Be Relied Upon.

The Company's repetitious reliance on the Audit Report is misplaced. As discussed in the Ratepayer Advocate's Initial Brief, the Audit Report is saturated with instances in which the Auditors quoted directly from the Company-written material *without attribution of any sort. RAIB Vol. II* at 39-43 The Audit Report is riddled with instances in which key conclusions, definitions, and explanations are verbatim copies of material provided by the Company in either testimony or discovery responses. The appearance is one of wholesale adoption by the Auditors of the Company's representations without any independent analysis of those positions by the Auditors. Indeed, the Audit Report, in substantial parts, is simply a restatement of the Company's testimony and discovery responses. In many instances, the Auditors simply reproduced Company testimony and discovery responses without any independent explanation as to the reasons why the Auditors adopted those positions. Thus, as the Auditors appear to have simply adopted the Company's statements at face value, it should come as no surprise that the Company pushes the Auditor's conclusions to the forefront of its case. The Audit Report does not evince evidence of independent analysis of the Company's actions and the Board was correct in not relying on such a faulty document.

3. The Company Has Misconstrued Board Staff's Use of The PJM Spot Market As A Benchmark Against Which To Measure The Company's Performance And Has Attempted To Shift The Board's Attention Away From JCP&L's Poor BGS Procurement Performance.

The Company has confused the notion of a benchmark with a prescription for practice. JCP&L argues extensively that if the Company had purchased all its BGS supply on the spot market, the result would be "significantly higher spot prices" and complains that if the Company had chosen to rely solely on the spot market, "the Company would have been excoriated by Staff for failing for have hedged its BGS obligations in advance." The Company's argument is based on its own fiction. There is no support in the record for the Company's contention that Board Staff recommended that the Company procure all its BGS supply through the PJM spot market.

Board Staff asked their Auditors to prepare a comparison of the cost of JCP&L's discretionary BGS purchases with the cost of making those purchases at the existing PJM market prices. The requested comparison was included in the Auditor's report as Appendix B and showed that, over the four years reviewed, "JCP&L's discretionary expenditures for BGS supplies totaled $1,119 million. The cost of these purchases using PJM prices would have totaled $793 million, a difference of $327 million." *Auditors Report, p. B-1*. Indeed, the chart summarizing this analysis shows that in each of the four years reviewed, JCP&L paid substantially more for BGS purchases than those purchases would have cost on the PJM spot market. In rejecting the Ratepayer Advocate's recommended use of the Pennsylvania affiliates' performance as the appropriate measure of the New Jersey utility's performance, Staff determined that the "more general benchmark, the default option of purchasing from PJM, provides a better measure of the Company's BGS procurement performance." *SIB at 155*.

Nowhere in the record does Staff make the recommendation that the Company should have procured its BGS supply through the PJM spot market. Even a rudimentary reading of Staff's position reveals that Staff recommended that the spot market be used as a *benchmark* from which to discern prices in a review process. This is quite a difference from recommending that a Company *purchase* all of its energy on the spot market. The Company's confusion of these two positions evidences at best a misguided litigation strategy, and at worse a gross misunderstanding of the concepts set forth in Staff's brief.

Tellingly, the Company does not argue that the PJM spot market prices are not a reasonable benchmark for comparison purposes nor has it proposed any other benchmark against which the Company's performance can be measured. Instead, the Company repeatedly argues that JCP&L has the "right" to recover its total BGS purchased power costs and that "any hindsight analysis [is] meaningless." *Motion*, pp. 5, 16. Indeed, the Company has effectively taken the position that there is no valid way to measure, after-the-fact, the effectiveness of its performance. In the Company's view, all that the Company should have to do is inform the Board that it ran models and used its "judgment" in applying the results of these models. Flying in the face of EDECA's requirement that the Company has the burden proof, the Company apparently feels that its BGS deferral is beyond reproach and the Company is entitled to recovery of the entire deferral without question.

Thus, the Company's entire disagreement with Board Staff's use of the PJM spot market is based on the Company's misunderstanding of Board Staff's position. The PJM spot market prices did exist and are useful as a measurement of performance. The fact that spot market prices may have been different under a different set of circumstances does not affect their usefulness in this instance as a performance benchmark. Indeed, the Company has suggested no other.

4. Summary

In sum, the Company has attempted to muddy the water with claims of "hindsight review," "significantly higher spot prices," and "real world" analysis. But, in fact, all this noise is only an attempt to conceal the Company's failure to prove its case. The Company has failed to demonstrate that its BGS procurement costs were reasonable and prudently incurred. The Company has railed against the use of the PJM spot market and the Pennsylvania affiliate's performance as a benchmark and yet has failed, despite ample opportunity, to give the Board any reasonable metric upon which to measure its performance. Indeed, the Company has created a situation where it may not be possible to produce an alternative metric. The Company chose not to monitor the effectiveness of its procurement activities and could not provide an adequate paper trail. *RAIB*, vol. 2, 8-12. It did not record explanations of its purchasing decisions or data on market conditions at the time a decision was made. The Company faults the benchmarks proposed by Board Staff and the Ratepayer Advocate and yet has refused to provide the Board with an alternative basis for review. The Board should, therefore, dismiss JCP&L's motion as without merit.

V. There Was Ample Evidence of the Company's Poor Reliability Performance in the Record to Merit a Decrease in its Equity Return.

Ignoring the extensive evidence and testimony filed by the Ratepayer Advocate in the present case showing the Company's consistently poor performance over the past several years, JCP&L nevertheless argues that the Board's decision to lower the Company's Return on Equity ("ROE") to 9.5% due to its poor performance was "unsupported by the record" and the Board "explicitly (and unlawfully) relies on matters outside the record." *Motion*, p. 25. JCP&L supports its position by making two basic points: 1) the Board relied solely on the recent outages to punish the Company for its poor performance; and 2) nothing in the record supports the 9.5% ROE. *Motion*, pp. 25-26. As discussed herein, the Company's assertions are wholly without merit and must be summarily dismissed.

First, as extensively discussed in the testimonies of Ratepayer Advocate witnesses Barbara Alexander and Peter Lanzolotta, and in Ratepayer Advocate's Initial, Reply briefs and Exception and Reply, the reliability issues faced by JCP&L customers are nothing new. Contrary to JCP&L's allegation in its Motion that service quality problems were not documented in the record (*Motion*, p. 26), the record is replete with evidence of JCP&L's historical reliability and service quality problems. Barbara Alexander's direct testimony recited the prior history of investigations and resulting Board orders. *R-26, Direct Testimony of Barbara Alexander*, pp.9-11. Ms. Alexander further analyzed in detail the actual performance data submitted by JCP&L over the last several years. *Id*. Ms. Alexander's testimony documented the Company's continuing reliability problems and compared JCP&L's performance to other New Jersey utilities by analyzing CAIDI and SAIFI, as well as other indicia of customer service, such as call center performance. Therefore, contrary to JCP&L's assertions, there is ample evidence on which the Board could rely to support the decision to decrease the Company's ROE.

The Second assertion made by the Company that the record does not support the reduction of JCP&L's ROE to 9.5% should also be rejected. The Ratepayer Advocate's filed litigated position is that an ROE of 9.5% is appropriate for JCP&L. The Ratepayer Advocate filed extensive evidence in support of this position. *R-41, Direct Testimony of Basil Copeland*, p. 4. Therefore, the Board's decision to impute a 9.5% ROE is within the zone of reasonableness. Moreover, Barbara Alexander in her direct testimony did testify to decreasing a utility's ROE if its performance in reliability is poor. In her Direct Testimony, Ms. Alexander states: "[i]n some states, utilities have been provided a lower rate of return as a result of documented inefficiencies or poor service quality performance. This is something that [the] Board may want to consider if a company fails to make appreciable progress in improving reliability." *R-26*, p. 6. Finally, the Board's chosen method of ensuring reliability in the future has been endorsed in New Jersey. For example, in *Lakewood Township v. Lakewood Water* Co., 54 *N.J. Super. 371*, 381(App. Div. 1959) the Appellate Division recognized that "... the Board would be privileged, in a case where the utility had failed over a long period to provide safe, proper and adequate service and had flagrantly disregarded orders of the Board to improve that service, to refuse any rate increase as the most practical method of getting the utility to remedy the deficiency." The record in this case illustrates the poor service quality provided by JCP&L for a number of years. JCP&L's customers have endured power outages that have severely

disrupted the lives and businesses of countless customers. To address these reliability issues, the Board has ordered the Company to improve its service on several occasions, but to no avail.[5] The Company left the

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[5] For example, on December 30, 1997, the Board ordered GPU "to implement certain staff recommendations designed to improve the time for restoring service and the ability of customers to obtain restoration information." *I/M/O the Investigation into Storm Related Electric Service Outages*, BPU Docket No. EX 98101130 (12/16/98).

On August of 1998, the Board expressed concern that GPU Energy's restoration times had not noticeably improved and requested a further investigation in utility tree trimming practices; workforce issues; such as line crews, support staff and preparedness, and training and customer issues; such as communication of adequate restoration information. *Id*.

In the summer of 1999, businesses and homes throughout JCP&L territory were without electrical power for several hours to several days. And again, in response, the Board initiated an investigation and ordered the Company to "take steps to improve its ability to deliver electricity." *I/M/O Board's Review and Investigation of GPU Energy Electric Utility System's Reliability*, Order, BPU Docket No. EA99070485 (April 26, 2000). The Board noted "significant areas of concern," including "inaccurate and inadequate inspection and test records," "diminished levels of workforce," and poor "outage restoration time statistics." *Id*.

In September, 2001, the Board based its approval of the acquisition of JCP&L by FirstEnergy on several conditions regarding staffing levels, reliability, and customer service performance. *See See I/M/O the Joint Petition of FirstEnergy Corp. and Jersey Central Power & Light Company, d/b/a GPU Energy for Approval of a Change in Ownership and Acquisition of Control of a New Jersey Public Utility and Other Relief*, BPU Docket No. EM00110870 (Order of Approval, Oct. 9, 2001)("Merger Order"), Stipulation ("Merger Stipulation").

Board no alternative but to reduce the ROE so that the residents' and businesses' interests to have reliable service are more aligned with the Company's interest to make a profit.

As the Appellate Division in *Lakewood Water* stated:

> The duty to provide safe, proper and adequate service is an element which the Board must take into consideration in determining what is a just and reasonable rate of return. The relations between adequate, efficient service and a fair return are mutual and interdependent. In no event should the rate granted a utility 'be more than the reasonable worth of the service supplied.

Lakewood Water Co. 54 NJ Super at 378.

The Company's argument that there is no record to support the specific "penalty" imposed, a lowered equity return, fails to understand that the Board, as a regulator of utilities can impose penalties and restrictions to insure reliability**.** For the foregoing reasons, the Board's actions are neither illegal nor outside of the factual evidence presented in the proceeding and should not be changed.

In 2002, at the Governor's request, the Company's reliability performance once again became the subject of a Board investigation after 180,000 JCP&L customers were without power, 40,000 of them without power for three days. *I/M/O the Board's Investigation Into JCP&L's Storm-Related Outages of August 2002*, BPU Docket No. EX02120950 (March 13, 2003). The Final Report to the Governor "identified concerns with JCP&L's storm response and the overall reliability of the company's electric distribution system." *Id.* No other electric utility in the State required the level of scrutiny that the Board deemed necessary for JCP&L reliability performance.

VI. The Board was Correct in Mandating That JCP&L be made to Abide by its Merger Stipulation.

The Board properly excluded from rates costs which JCP&L claimed were merger-related. *Summary Order*, pp. 6-7. More specifically, the Board disallowed $7,677,000 of test-year merger-related costs and an additional $35,019,000 of severance payments which were paid in 2001. *Id*. JCP&L now alleges that the exclusion of the resulting total of $42.7 million of merger-related costs would result in "double-counting" of the merger savings due its New Jersey ratepayers. *Motion*, p. 29. JCP&L now seeks a Board ruling which would permit it to offset the $70.9 million of test year merger savings with $42.7 million of merger-related costs. *Motion*, p. 32. Contrary to JCP&L's assertions, as set forth in its briefs and testimony of its expert witness, the Ratepayer Advocate respectfully submits that the recognition of any merger related costs in JCP&L's rate proceeding is in direct contravention with the Board's Merger Order and the Stipulation signed by the parties in the merger proceeding.[6] *See RAIEBv1*, pp. 35-36; *RAIBv1*, pp. 56-59; *RARB*, pp. 29-30; *R-38*, p. 22.

When GPU Energy, JCP&L and FirstEnergy Corp. sought Board approval of the merger, the amount of merger savings that would be passed on to ratepayers and the amount of merger costs that would be included in rates were intensely contested issues. The parties involved in the Merger proceeding arrived at a settlement and subsequently signed a Stipulation which allocated $300 million of net merger savings to JCP&L ratepayers to reduce JCP&L's deferred balance upon completion of the merger. Similarly, the Company's shareholders were allocated a portion of the net merger savings. In addition, the Board allowed JCP&L to recover certain costs associated with the merger. Those costs were recognized in the net merger savings calculation. *R-38*, p. 22.

The recognition of any further merger related costs will result in double counting because these costs have already been used to reduce the gross savings estimate used as the basis for the $300 million net merger

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[6] *See I/M/O the Joint Petition of FirstEnergy Corp. and Jersey Central Power & Light Company, d/b/a GPU Energy for Approval of a Change in Ownership and Acquisition of Control of a New Jersey Public Utility and Other Relief*, BPU Docket No. EM00110870 (Order of Approval, Oct. 9, 2001)("Merger Order"), Stipulation ("Merger Stipulation").

savings allocated to ratepayers, as Mr. Peterson noted in his filed testimony. *R-38*, p. 22. The Merger Stipulation provided that all merger-related costs were used to reduce the gross savings estimate in developing the net savings amount. In fact, JCP&L acknowledged in discovery response RAR-RR-47 that the merger related expenses for which it seeks recovery were contemplated at the time of the Merger Stipulation:

> The category of costs included in Normalization Adjustment No. 8 were all contemplated at the time of the Merger Stipulation. The category of costs included Incremental IT, Equipment, Relocation, Severance, Outside Services, and Miscellaneous.

R-38 (attachment)

Mr. Peterson provided further testimony on this point at hearing:

> Merger cost treatment, the ratepayer advocate, Jersey Central,. GPU, First Energy, and all the participants in the merger proceeding signed a stipulation that JCP&L would not ask for or seek recovery of merger costs in the rates. Well, the $300 million that was agreed to by the parties in that settlement was a net of cost amount, that is, all costs were already considered when the $300 million offer was accepted.

T97:4-13 (2/26/03)

Upon cross examination, Mr. Peterson reiterated his well reasoned conclusion that all recoverable costs associated with the merger that the Company was entitled to were fully addressed in the merger proceedings.

> Q: I mean, if in the test year all savings are flowed directly to the ratepayer, where is the company getting back the cost to achieve that it is supposed to be getting back pursuant to the merger settlement?
>
> A: You got the cost to achieve in the $300 million. That is a net of cost number.

T153:17-23 (2/26/03).

If JCP&L had not been allowed to recover merger costs as part of the merger proceeding, then the merger savings amount credited to ratepayers would have exceeded the $300 million figure agreed upon by the parties. In fact, in its brief filed in support if its Motion, JCP&L cited a study which showed that the merger savings over ten years would approach $1.6 billion. *Motion*, p. 29.

Even if the $42.7 million is used as an offset to savings, as Mr. Peterson testified at hearing "[t]he only thing that is verifiable is the actual costs spent . . . [t]here has been no verification of any savings." T157:5-6, 8-9 (2/26/03). It is not inconceivable that the merger savings might be greater than that claimed by the Company. If merger cost are allowed into rates through an offset to claimed savings, JCP&L will be able to recover $43 million each year in merger related costs from ratepayers as long as rates are in effect. When asked on cross examination if it was probable that the $43 million would be built into future rates and be included as a expense indefinitely, JCP&L's Mr. Preiss responded affirmatively. T85:12-15 (2/25/03).

JCP&L now claims that all it is seeking is to allow $28.2 million in merger savings per year to flow through to ratepayers.[7] JCP&L, p. 32. However, the $28.2 million savings figure cited by the Company is based on the Company recovering $42.7 million of merger related costs <u>each year</u>. Thus, if annual savings passed on to ratepayers are limited to $28.2 million, the Company will recover $427 million in merger costs over a ten-year period, in addition to what was already provided in the $300 million up-front net savings number, even though the Company's claimed test year merger costs were only $42.7 million.

Furthermore, of the $42.7 million of cost-to-achieve that the Company wants to recover through an netting offset, $35 million was incurred in 2001 and relates to severance pay for employees who were actually terminated and received their severance payments during the 2002 year. JCP&L admitted that "accounting rules required these anticipated 2002 severance payments to be recorded at the time of the merger closing in November 2001." *PIB*, p. 78. Therefore, absent Board authorization allowing JCP&L to defer pre-test year merger costs, JCP&L cannot justify the recovery of $35 million of merger costs that were written off in 2001. As noted by Board Staff in its Initial Brief before the OAL, the Board did not provide for the deferred recovery of merger expenses incurred prior to the test year employed in the instant proceeding. *SIB, p.* 66.

Accordingly, the Ratepayer Advocate respectfully submits that theBoard should reject JCP&L's request for reconsideration of the Board's decision to disallow the recovery of JCP&L's claimed merger-related costs.

VII. Conclusion.

For all the foregoing reasons, the Ratepayer Advocate respectfully requests that the Board deny the Company's Motion for Reconsideration.

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[7] $70.9 million merger savings, less $42.7 of merger-related costs. JCP&L, p. 32.

Respectfully submitted,

SEEMA M. SINGH, ESQ.
RATEPAYER ADVOCATE

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